

ASSEMBLY BILL

No. 209

Introduced by Assembly Member Cedillo

January 25, 1999

An act to amend Sections 4635, 4636, 4637, and 4638 of the Labor Code, relating to workers' compensation.

LEGISLATIVE COUNSEL'S DIGEST

AB 209, as introduced, Cedillo. Workers' compensation: vocational rehabilitation.

Existing law governing workers' compensation prescribes procedures and standards for determining the medical eligibility of an injured employee to accept and participate in vocational rehabilitation services. Existing law, among other things, provides that when aggregate total disability exceeds 365 days and the employee has not been previously identified as medically eligible for vocational rehabilitation, there shall be a rebuttable presumption that the employee is medically eligible for vocational rehabilitation services.

This bill would, in addition, provide that when aggregate total disability exceeds 180 days and the employee has not been previously identified as medically eligible for vocational rehabilitation services, the employer or the employer's insurer shall assign within 10 days a qualified rehabilitation representative to develop a job description, to submit the description for medical review, to explore the ability of the employee to engage in temporary modified work, if available, and to explore the availability of modified or alternative work, if the employee is excluded from engaging in his or her usual

occupation or the occupation in which he or she was engaged at the time of injury. It would also authorize the representative in that case to refer the employee for a medical evaluation of the employee's functional or physical capacity to perform modified or alternative work.

This bill would also require qualified rehabilitation representatives, in addition to their existing qualifications, to be members in good standing of, or certified by, a related professional organization that has a peer review mechanism. This bill would also make several technical, conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 4635 of the Labor Code is
2 amended to read:

3 4635. As used in this article:

4 (a) "Qualified injured worker" means an employee
5 who meets both of the following requirements:

6 (1) The employee's expected permanent disability as
7 a result of the injury, whether or not combined with the
8 effects of a prior injury or disability, if any, permanently
9 precludes, or is likely to preclude, the employee from
10 engaging in his or her usual occupation or the position in
11 which he or she was engaged at the time of injury,
12 hereafter referred to as "medical eligibility."

13 (2) The employee can reasonably be expected to
14 return to suitable gainful employment through the
15 provision of vocational rehabilitation services, hereafter
16 referred to as "vocational feasibility."

17 (b) "Qualified rehabilitation representative" means a
18 person capable of developing and implementing a
19 vocational rehabilitation plan and whose experience and
20 regular duties involve the evaluation, counseling, or
21 placement of disabled persons, ~~and~~ who is familiar with
22 this article, *and who is a member in good standing of, or*
23 *certified by, a related professional organization that has*
24 *a peer review mechanism.* It is the intent of the

1 Legislature to allow use of an in-house qualified
2 rehabilitation representative. If the injured worker is
3 represented by an attorney, and an in-house qualified
4 rehabilitation representative is utilized, communication
5 directly with that in-house qualified rehabilitation
6 representative by the injured worker's attorney shall not
7 constitute a violation of Rule 2-100 of the State Bar Rules
8 of Professional Conduct.

9 (c) "Independent vocational evaluator" means a
10 qualified rehabilitation representative, who, in addition
11 to *meeting all of* the requirements of subdivision (b), has
12 one of the following qualifications:

13 (1) A doctorate or master's degree in vocational
14 counseling or its equivalent and one or more years
15 full-time experience in vocational counseling of
16 industrially injured employees.

17 (2) A doctor of medicine degree and one or more years
18 full-time experience in psychiatric or psychological
19 evaluation of disabled adults in relation to rehabilitation
20 counseling.

21 (3) A doctorate or master's degree in counseling or
22 psychology or their equivalent and two or more years
23 full-time employment using rehabilitation counseling
24 techniques and conducting vocational evaluations of
25 disabled adults under the direct supervision of an
26 independent vocational evaluator.

27 (4) A baccalaureate degree in any field and three or
28 more years full-time employment using rehabilitation
29 counseling techniques and conducting vocational
30 evaluations of disabled adults under the direct
31 supervision of an independent vocational evaluator.

32 (d) "Vocational rehabilitation services" means those
33 services required to determine if an employee can
34 reasonably be expected to return to suitable gainful
35 employment and those services reasonably necessary to
36 provide an employee with the opportunity to return to
37 suitable gainful employment. These services may
38 include, but are not limited to, vocational and medical
39 evaluation, counseling, job analysis, job modification
40 assistance, retraining, including on-the-job training or

1 training for alternative employment, formal training,
2 academic instruction, and job placement assistance.

3 (e) “Vocational rehabilitation plan” means the
4 written description of and rationale for the manner and
5 means by which it is proposed that a qualified injured
6 worker may be returned to suitable gainful employment.
7 The plan may contemplate direct job placement
8 assistance, on-the-job training, formal training, academic
9 instruction, job placement assistance, or
10 self-employment. The plan shall specify the anticipated
11 completion date of vocational rehabilitation services and
12 the amount and source of payments to be made to the
13 qualified injured workers during the pendency of the
14 plan. The plan shall also define the responsibilities of the
15 employee, employer, qualified rehabilitation
16 representative, and any other parties in implementing
17 the plan. The plan may contemplate modification of the
18 employee’s occupation at the time of injury or provision
19 for alternative work if the employer has initially failed or
20 refused to provide modified or alternative work to the
21 injured worker.

22 (f) “Suitable gainful employment” means that
23 employment or self-employment which is reasonably
24 attainable and which offers an opportunity to restore the
25 employee as soon as practicable and as near as possible to
26 maximum self-support, due consideration being given to
27 the employee’s qualifications, likely permanent
28 disability, vocational interests and aptitudes, preinjury
29 earnings and future earning capacity, and the present
30 and projected labor market. No one factor shall be
31 considered solely in determining suitable gainful
32 employment.

33 SEC. 2. Section 4636 of the Labor Code is amended to
34 read:

35 4636. (a) When aggregate total disability continues
36 for 90 days, the employer immediately shall provide to
37 the employee in the form and manner prescribed by the
38 administrative director, information that provides notice
39 of rights under the Americans with Disabilities Act and
40 the provisions of the Fair Employment and Housing Act

1 relating to individuals with a disability, and that explains
2 the employee's rights and obligations pertaining to
3 vocational rehabilitation, the nature and scope of
4 vocational rehabilitation services to which the employee
5 may be entitled, the maintenance allowance payable
6 under Section 139.5, the effect of any delay in the treating
7 physician's determination of medical eligibility, and that
8 additional information may be obtained from an
9 information assistance officer. When aggregate total
10 disability exceeds 90 days and the employee has not
11 previously been identified as meeting the medical
12 eligibility requirements of paragraph (1) of subdivision
13 (a) of Section 4635, the employer shall provide the
14 employee's treating physician with a job description,
15 developed jointly with the employee and the employer,
16 and the physical requirements of the employee's duties
17 at the time of injury in the form and manner prescribed
18 by the administrative director, and request the treating
19 physician to determine the employee's medical eligibility
20 for vocational rehabilitation services. The treating
21 physician's determination of medical eligibility shall take
22 into account the employee's current and probable future
23 medical condition, an estimate of the employee's current
24 and potential functional limitations, the ability of the
25 employee to accept and participate in vocational
26 rehabilitation services if and when indicated,
27 recommendations for subsequent evaluation or services,
28 if any, the ability of the employee to engage in light work
29 in a modified or alternative capacity, if available, and
30 other information as may reasonably be prescribed by
31 rules and regulations of the administrative director.

32 (b) If the employee's treating physician is unable to
33 make the assessment of medical eligibility at the time of
34 initial contact, the employer shall continue to monitor the
35 employee's recovery and request the treating physician
36 to report as soon as the physician is able to determine
37 whether the employee is medically eligible for vocational
38 rehabilitation services. The treating physician shall
39 report to both the employer and the employee no less
40 frequently than every 60 days thereafter. The report also

1 shall include an opinion concerning the physical
2 capabilities of the employee at the time of each report.
3 The reports shall continue to be made until the physician
4 provides a report concluding one of the following:

5 (1) The employee is released to return to work at his
6 or her usual occupation or, if the employee was engaged
7 in another occupation at the time of injury, the
8 occupation the employee was engaged in at the time of
9 injury.

10 (2) The employee's permanent disability as the result
11 of the injury, whether or not combined with the effects
12 of a prior injury or disability, if any, permanently
13 precludes, or is likely to preclude, the employee from
14 engaging in the employee's usual occupation or the
15 occupation in which the employee was engaged at the
16 time of injury.

17 (c) *When aggregate total disability exceeds 180 days*
18 *and the employee has not been previously identified as*
19 *medically eligible for vocational rehabilitation services*
20 *pursuant to subdivision (a), the employer or the*
21 *employer's insurer shall assign within 10 days a qualified*
22 *rehabilitation representative to develop a job description,*
23 *to submit the description for medical review, to explore*
24 *the ability of the employee to engage in temporary*
25 *modified work, if available, and to explore the availability*
26 *of modified or alternative work, if the employee is*
27 *excluded from engaging in his or her usual occupation or*
28 *the occupation in which he or she was engaged at the time*
29 *of the injury. The qualified rehabilitation representative*
30 *may refer the employee for a medical evaluation of the*
31 *employee's functional or physical capacity to perform*
32 *modified or alternative work.*

33 (d) When aggregate total disability exceeds 365 days
34 and the employee has not been previously identified as
35 medically eligible for vocational rehabilitation, there
36 shall be a rebuttable presumption that the employee is
37 medically eligible for vocational rehabilitation services.

38 ~~(d)~~

39 (e) Immediately upon receipt of the treating
40 physician's final report required by this section, the

1 employer shall provide a copy to the employee together
2 with notice of the procedure to be followed in contesting
3 the treating physician's determination. The notice shall
4 be in writing in the form and manner prescribed by the
5 administrative director, and shall include the following:

6 (1) Notice of whether the employer will be able or
7 unable to offer modified or alternative work.

8 (2) Notice that the employee may be eligible for
9 services if the employee is unable to return either to his
10 or her usual occupation or the occupation in which he or
11 she was engaged at the time of injury.

12 SEC. 3. Section 4637 of the Labor Code is amended to
13 read:

14 4637. (a) Within 10 days after the employee is
15 medically eligible under subdivision—(e) (d) of Section
16 4636, or the employer receives a physician's report, or
17 knowledge of a physician's opinion, indicating an
18 employee is medically eligible, the employer shall notify
19 the employee of his or her medical eligibility for
20 vocational rehabilitation services. The notice shall be in
21 writing, in the form and manner prescribed by the
22 administrative director, with a copy forwarded to the
23 vocational rehabilitation unit . The notice shall include all
24 of the following:

25 (1) An explanation of vocational rehabilitation
26 services available to the employee, including the
27 maintenance allowance payable under Section 139.5 and
28 the effect of any delay in the acceptance of vocational
29 rehabilitation services.

30 (2) Instructions as to how the employee may apply for
31 vocational rehabilitation services.

32 (3) Notice that failure to apply within 90 days of
33 receipt of notice of medical eligibility may terminate the
34 employee's entitlement to vocational rehabilitation
35 services, unless the treating physician determines that
36 the employee is medically unable to participate in the
37 provision of vocational rehabilitation services except as
38 otherwise provided by Section 5410.

39 (4) Notice of the employee's right to an agreed upon
40 qualified rehabilitation representative and to request an

1 evaluation of vocational feasibility prior to any
2 acceptance or rejection of vocational rehabilitation
3 services and the right to request a change of qualified
4 rehabilitation representative pursuant to Section 4640.

5 (5) Notice that vocational rehabilitation services may
6 not be settled or otherwise converted to cash payments.

7 Immediately thereafter, unless the employee's medical
8 condition precludes participation or the employee
9 declines to accept vocational rehabilitation services, the
10 employer shall assign a qualified rehabilitation
11 representative, selected in agreement with the
12 employee, to determine if the employee meets the
13 vocational feasibility requirements of paragraph (2) of
14 subdivision (a) of Section 4635. If agreement cannot be
15 reached, a qualified rehabilitation representative shall be
16 selected pursuant to Section 4640.

17 (b) If an employee is notified of his or her potential
18 entitlement to vocational rehabilitation services pursuant
19 to subdivision (a) and it is subsequently determined that
20 the employee is not a qualified injured worker, the
21 employer shall notify the employee, in the form and
22 manner prescribed by the administrative director, that
23 he or she is not entitled to further vocational
24 rehabilitation services, the reasons therefor, and the
25 procedure to be followed in contesting the
26 determination.

27 SEC. 4. Section 4638 of the Labor Code is amended to
28 read:

29 4638. (a) If the employee is determined to be a
30 qualified injured worker, and the employer notifies the
31 injured worker, pursuant to paragraph (1) of subdivision
32 ~~(d)~~ (e) of Section 4636 that the employer will be unable
33 to provide modified or alternative work to that injured
34 worker, the qualified rehabilitation representative and
35 the employee, jointly, shall develop an agreed-upon
36 vocational rehabilitation plan pursuant to subdivision (e)
37 of Section 4635.

38 Vocational rehabilitation plans which utilize an
39 employee's transferable skills and experience shall be
40 preferable to plans that propose training for an

1 occupation in which the employee has no skills or
2 experience.

3 An insured employer in whose employment the injury
4 occurred shall receive a refund, payable in the same
5 manner as a return of a standard insurance premium,
6 from the insurer that provided the security for the
7 payment of compensation on the date of injury when the
8 employer, pursuant to Section 4644, returns the qualified
9 injured worker to modified or alternative work at the
10 employer's place of employment for 12 consecutive
11 months. The refund shall be equal to the standard
12 premium computed on the wages paid by the employer
13 to the qualified injured worker during the 12-month
14 period and shall be calculated as follows: multiply the
15 workers' compensation insurance premium rate times
16 the wages reported for workers' compensation insurance
17 for the qualified injured worker during that 12-month
18 period. For this calculation, the workers' compensation
19 insurance rate shall be the insurance premium rate or
20 rates per one hundred dollars (\$100) of payroll which
21 were applicable to the payroll reported for the qualified
22 injured worker during that 12-month period, modified by
23 the experience modification factor or factors, if any,
24 which were applicable to the employer during that
25 12-month period. During and after the 12-month period,
26 the qualified injured worker shall be protected against
27 discrimination pursuant to Section 132a.

28 (b) Within 90 days after determination of the
29 employee's vocational feasibility, the employer shall do
30 either of the following:

31 (1) Submit a vocational rehabilitation plan agreed to
32 by the employee to the administrative director's
33 vocational rehabilitation unit for review and approval
34 when required pursuant to Section 139.5.

35 (2) Request the administrative director's vocational
36 rehabilitation unit to resolve any dispute concerning the
37 provision of vocational rehabilitation services.

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